Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1272

ROGER NOALL, as Executive Vice President of Bunge Corporation

Petitioner,

v.

UNITED STATES OF AMERICA and FELIX KARUL, Revenue Agent of the Internal Revenue Service

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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February 15, 1979

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v.

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the Internal Revenue Service,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on November 17, 1978.

Opinions Below

The opinion of the Court of Appeals is officially reported at 587 F.2d 123 (2d Cir. 1978) and is included in the Appendix at 1a. The opinion rendered by the United States District Court for the Southern District of New York in this matter is not officially reported and is included in the Appendix at 8a.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on November 17, 1978. The Petition for Certiorari was filed within ninety days of that date. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Questions Presented

1. Whether the Court of Appeals in making its determination should have taken into account the fact that the documents at issue were not prepared in connection with or used to facilitate the preparation and filing of Bunge's tax returns?

2. Whether the Court of Appeals in making its determination that such documents must be produced should have considered the public policy grounds for not requiring their production?

3. Whether the taxpayer was entitled to an evidentiary hearing before the District Court since the taxpayer put into issue the allegations of the complaint and raised proper affirmative defenses?

Statutes Involved

Internal Revenue Code of 1954, as amended, 26 U.S.C. §§ 7402(b), 7602 and 7604(a), which are set forth in full in the Appendix at 10a.

Statement of the Case

This proceeding, instituted by the United States of America and Felix Karul, a revenue agent of the Internal Revenue Service (herein, collectively referred to as the "IRS"), was brought on by an order to show cause why

Roger Noall, as Executive Vice President of Bunge Corporation, should not be ordered to comply with a summons served by the IRS. That summons demanded all internal audit reports and related work papers of Bunge Corporation ("Bunge") for the taxable years ending March 31, 1972, March 31, 1973 and March 31, 1974, which years were being audited by the IRS. The petition to enforce the summons was filed in the United States District Court for the Southern District of New York. The jurisdiction of the District Court was invoked under Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954, as amended (herein the "Code").

Bunge refused to comply with the demand of the summons on the grounds, amongst others, that the documents were not used in the preparation of Bunge's tax returns, and thus, were irrelevant to the IRS' investigation, and that there were strong public policy reasons why these reports should not be disclosed since the nature of Bunge's internal audit program required that the contents of such reports be kept confidential. Bunge requested that an evidentiary hearing be held so that the lack of relevance and confidential nature of the documents could be shown.

The District Court in a memorandum decision dated May 12, 1978 ordered enforcement of the summons and denied Bunge's request for an evidentiary hearing. See Appendix at 8a. A Notice of Appeal of this final order was filed by Bunge on May 22, 1978. On November 17, 1978, the United States Court of Appeals for the Second Circuit affirmed the order of the District Court, holding that Bunge need not have been given the opportunity to present its defenses in an evidentiary hearing, that the internal audit reports were subject to compelled production, and that it did not even have to consider Bunge's public policy arguments.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

A. *Other Courts of Appeals Have Held That Relevancy Under Section 7602 Requires A Consideration of Whether the Requested Documents Were Used in the Preparation of the Tax Returns.*

In *United States* v. *Coopers & Lybrand,* 550 F.2d 615 (10th Cir. 1977), *aff'g* 413 F. Supp. 942 (D. Col. 1975), the Tenth Circuit held that relevancy under Section 7602 of the Code included a determination of whether the reports sought by the IRS were prepared in connection with or used to facilitate the preparation and filing of the taxpayer's tax returns and determined that the reports were not so used:

> ". . . [W]e hold that the court properly found that the tax pool analysis file was not relevant and therefore not subject to production under the summons. In this respect we deem it worthy of repeating that it was uncontroverted that the tax pool analysis file was not prepared in connection with or used to facilitate the preparation and filing of J-M's tax returns and that [Coopers & Lybrand] has no responsibility for any J-M tax matters." 550 F.2d at 621.

In the instant case, the Court of Appeals came to a contrary determination. In deciding that the reports in question were relevant and subject to production under the summons, the Court stated in its opinion that, "[we] find no significance in the point . . . that the internal audit reports and related work papers were not used in preparing Bunge's income tax returns." *United States* v. *Noall,* 587 F.2d 123, 126 (2d Cir. 1978) (Appendix at 4a). This conflicts directly with the Tenth Circuit's decision in *United States* v. *Coopers & Lybrand, supra,* and the Court of Appeals in the instant case admitted as much.

> "In refusing to enforce the summons in regard to the tax pool analysis [in *Coopers & Lybrand*], both the district court and the court of appeals gave much weight to the fact that this was not used in preparing the company's income tax return, 413 F. Supp. at 950, 953-54, 550 F.2d at 620-21. *To the extent that the decision was influenced by this factor, it is not authoritative in this circuit.*" 587 F.2d at 127 (Appendix at 6a) (footnotes omitted) (emphasis supplied).

The information sought by the IRS in this case closely resembles the documents which were the subject of the summons which the Tenth Circuit refused to enforce in *Coopers & Lybrand, supra.* In that case, the IRS sought an audit program similar to Bunge's, which had been prepared by the auditors, as well as a tax pool analysis file. The audit program was a series of procedures and checklists used by the accountants to confirm that the audit staff followed established guidelines in examining the taxpayer's books and records. The tax pool analysis file was prepared by the taxpayer's employees as an estimate of contingent tax liabilities for future income tax periods.

In the instant case, Bunge's internal audit reports were not used in the preparation of the company's tax returns. The reports were instituted in 1970 in order to assist the managers of Bunge's various accounting offices in establishing uniform and consistent bookkeeping practices throughout the company. Under the procedures established in 1970, members of Bunge's own audit staff visit the company's various offices, review the offices' accounting practices, and prepare reports on those visits—internal audit reports. The reports contain ideas, theories and opinions of the internal auditors based on their analyses of the books and records. The reports are not records of corporate transactions nor do they contain such records.

B. *Other Courts of Appeals Have Held That Public Policy is a Factor to be Considered in Determining the Enforcement of an IRS Summons.*

In the instant case, the Court of Appeals held that considerations of public policy are not appropriate in a proceeding to enforce an IRS summons. 587 F.2d at 126. Again, in *Coopers & Lybrand,* both the District Court and the Court of Appeals came to a contrary conclusion.

In *Cooper & Lybrand,* the District Court found that policy considerations were "[appropriate] . . . in the context of a judicial enforcement proceeding" and gave the policy arguments "due consideration." 413 F. Supp. at 948-49.*

In the present case, the Court of Appeals' decision not only conflicts with the decision of the Tenth Circuit, but also conflicts with decisions of the Fourth Circuit and other courts that the public policy in favor of keeping internal evaluative reports confidential should be a factor in any decision concerning discovery. *See, e.g., Keyes* v. *Lenoir Rhyne Junior College,* 552 F.2d 579, 581 (4th Cir. 1977), *cert. denied,* 434 U.S. 904 (1978); *Bredice* v. *Doctors Hospital, Inc.,* 50 F.R.D. 249, *aff'd on rehearing,* 51 F.R.D. 187 (D.D.C. 1970), *aff'd,* 479 F.2d 920 (D.C.Cir. 1973).

In the present case, there are compelling public policy reasons for not requiring disclosure of Bunge's internal audit reports. Through these reports, Bunge is able to monitor its internal accounting and other procedures and point out areas where improvements may be necessary. The success of the internal audit program is based on the frankness and candor of the company's internal audit staff and employees, which would be impaired by the disclosure

*See also *United States* v. *First Chicago Corp.,* 1979-1 U.S.T.C. (CCH) ¶ 9111 (N.D. Ill. 1979).

demanded by the IRS. Such disclosure could result in the discontinuance of internal review programs.*

C. *The Standard Applied by the Second Circuit for Requiring an Evidentiary Hearing is in Conflict with Other Courts of Appeals.*

The Court of Appeals below upheld the decision of the District Court that Bunge was not entitled to an evidentiary hearing. 587 F.2d at 127. This was done notwithstanding the fact that Bunge had, by affidavit, controverted the allegations of the summons and raised legally sufficient defenses.** This holding is contrary to the teachings of this Court and in direct conflict with decisions of the Courts of Appeals for the First, Third and Fifth Circuits.

Bunge's request for an evidentiary hearing was denied by the District Court and approved by the Court of Appeals on the basis of the Second Circuit's decision in *United States* v. *Morgan Guaranty Trust Co.,* 572 F.2d 36 (2d Cir.), *cert. denied sub nom., Keech* v. *United States,* 99 S.Ct. 89 (1978). The Court of Appeals in *Morgan Guaranty* held

*A corporation would be reluctant to voluntarily perform its own self-examination if that examination could be used against it. *See New York Stock Exchange* v. *Sloan,* 22 Fed.R.Serv.2d 500, 503, (S.D.N.Y. 1976), *Banks* v. *Lockheed-Georgia Co.,* 53 F.R.D. 283, 285 (N.D.Ga. 1971). The importance of such internal reviews to the public has been underscored by several decisions where the policy of encouraging such reviews has been articulated and applied to deny discovery. *See Keyes* v. *Lenoir Rhyne College, supra; Bredice* v. *Doctors Hospital, Inc., supra; Scott* v. *McDonald,* 70 F.R.D. 568, 573 (N.D.Ga. 1977); *Gillman* v. *United States,* 53 F.R.D. 316, 318 (S.D.N.Y. 1971); *Richards* v. *Maine Central R.R.,* 21 F.R.D. 590, 591 (D.Me. 1957).

**On May 9, 1978, a brief oral argument was held in the instant matter before the District Judge. There was no transcript of those proceedings. Due to filing errors by the Clerk's Office, the District Judge had not had prior opportunity to review any of the papers submitted by Bunge.

that the taxpayer failed to make the "substantial preliminary showing" which was necessary before the requested discovery sought by the taxpayer could be ordered. *Morgan Guaranty* at 42-43, n.9.*

The Court in *United States* v. *Powell*, 379 U.S. 48 (1964), set forth the procedure to be followed in enforcing an IRS summons. The Court held in that case that the taxpayer is entitled to "an adversary hearing . . . before enforcement is ordered." 379 U.S. at 58.

The Supreme Court recently reaffirmed its commitment to the requirement of an adversary hearing when it had occasion to examine a related issue concerning the enforceability of a summons alleged by the taxpayer to have been issued in pursuit of a criminal investigation.** *See United States* v. *LaSalle National Bank*, 98 S. Ct. 2357 (1978). The Supreme Court in *LaSalle* restricted this defense by the taxpayer to an examination of the institutional posture of the IRS in connection with their audit. Nonetheless, the Supreme Court held that the taxpayer must be given an opportunity to make this showing through an adversary hearing.

The decision of the Second Circuit conflicts not only with the decision of this Court but with other Circuit Courts as well. *See United States* v. *Garrett*, 571 F.2d 1323 (5th Cir. 1978); *United States* v. *McCarthy*, 514 F.2d 368, 373 (3d Cir. 1975); *United States* v. *Salter*, 432 F.2d 697, 701 (1st Cir. 1970). In *McCarthy*, the Court required an evidentiary hearing where the person summoned "puts in issue allegations of the complaint [and] raises proper affirmative defenses." *United States* v. *McCarthy, supra* at

*In *Morgan Guaranty*, the Second Circuit denied taxpayer's request for discovery, while, in the instant case, Bunge merely requested an evidentiary hearing—a far less burdensome procedure to the IRS.

**No such defense has been raised by Bunge nor is such a defense an issue in this case.

373. Bunge did just that, but the Court of Appeals still denied the request for further proceedings, whether those proceedings were to submit testimony in court or through affidavits or even to recommend to the District Court alternative procedures, such as *in camera* proceedings.* To the extent that the Second Circuit's opinion in *Morgan Guaranty* allows the taxpayer only the opportunity to file an answer, it is in clear conflict with the decisions of other Circuits and the rule espoused by this Court.

II

ISSUES PRESENTED IN THIS CASE HAVE YET TO BE PASSED ON BY THIS COURT AND ARE OF CONTINUING IMPORTANCE IN THE ADMINISTRATION OF THE TAX LAWS OF THE UNITED STATES.

The decision below provides that the IRS may demand wholly derivative confidential documents that were not used in any way by the taxpayer in preparing his return and that the production of these documents can be compelled without giving the taxpayer the benefit of an evidentiary hearing and without even considering any arguments of public policy advanced by the taxpayer. These issues are of continuing importance in the proper administration of the tax laws of the United States. As the conflict in the decisions of the Courts of Appeals indicates, this Court has yet to pass on these questions, which are of concern to every taxpayer in the United States. Whether a rule such as that advanced by the Court below should ever become the law is peculiarly for this Court to decide.

*Such a procedure was recently employed by Judge Willa in *United States* v. *First Chicago Corp., supra.*

Conclusion

It is clear that the issues outlined above are of continuing importance to the enforcement of the revenue laws and that the decision of the Second Circuit represents a conflict both with the law as stated by the Supreme Court as well as the law as stated by several Courts of Appeals. For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully Submitted,

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February 15, 1979

APPENDIX

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 113—August Term 1978

Argued October 25, 1978 Decided November 17, 1978

Docket No. 78-6092

UNITED STATES OF AMERICA, and FELIX KARUL,
Revenue Agent of the Internal Revenue Service,

Petitioners-Appellees,

v.

ROGER NOALL, as Executive Vice-President of
Bunge Corporation,

Respondent-Appellant.

Before FRIENDLY, MULLIGAN and GURFEIN, C.J.J.

Appeal from an order of the District Court for the Southern District of New York, John M. Cannella, *Judge,* enforcing an IRS summons for the production of a taxpayer's internal audit reports and related work papers. Affirmed.

David M. Jones, Esq., Assistant United States Attorney for the Southern District of New York (Robert B. Fiske, Jr., Esq., United States Attorney for the Southern District of New York, Louis G. Corsi, Esq. and Frederick P. Schaffer, Esq., Assistant United States Attorneys, Of Counsel), for petitioners-appellees.

Bruce E. Pindyck, Esq., New York, New York (Olwine, Connelly, Chase, O'Donnell & Weyher, New York, N. Y., Edward A. Vrooman, Esq., Matthew M. McKenna, Esq., and Gary Hoppe, Esq., Of Counsel), for respondent-appellant.

FRIENDLY, Circuit Judge:

The United States and Felix Karul, an IRS agent, brought this proceeding in the District Court for the Southern District of New York under IRC §§ 7402(b) and 7604(a) to enforce an IRS summons directed to Roger Noall, Executive Vice-President of the taxpayer, Bunge Corporation (Bunge). The petition recited that Karul was conducting an investigation for the purpose of ascertaining the correctness of Bunge's income tax returns for the fiscal years ending March 31, 1972, 1973 and 1974. The summons required Noall to appear before the agent and produce for examination:

> All Internal audit reports and related work papers for the periods ended 3-31-72, 3-31-73, 3-31-74.

An order to show cause having issued, Noall submitted opposing affidavits of counsel, of himself, and of William A. Merritt, Jr., a Vice-President and former Controller of Bunge, who had instituted the internal audit program; these recited various objections to production with which we will deal hereafter. After considering these affidavits and memoranda of law[1] and hearing argument, Judge Cannella entered an order enforcing the summons and denying a request for an evidentiary hearing, from which this appeal has been taken.

The Government does not dispute that the internal audit reports and related work papers are not accounting records of Bunge. This, however, is in no way dispositive since IRC § 7602(2) is not so limited but authorizes the Secretary or his delegate, see IRC § 7701(a)(11)(B), to summon any officer or employee of a taxpayer "to produce such books, papers, records, or other data . . . as may be relevant or material" to his inquiry into the correctness of income tax returns.

The affidavit of Bunge's counsel described the audit reports as consisting

> primarily of the analyses by Bunge's internal auditors of the books and records by various divisions and related corporations as part of Bunge's program to monitor and supervise the accounting, financial planning, and established operational plans and procedures of those divisions.

He also stated that

> [t]he internal audit reports represent an attempt by Bunge to insure uniform bookkeeping practices, compliance with management directives and with internal control and operational procedures by those divisions.

and that

> the internal audit reports may include hearsay, rumors, opinions and other evidence gathered from the examination of certain bookkeeping practices by Bunge's employees.

The Noall and Merritt affidavits added nothing significant except for Merritt's statement that the work papers, documents and other materials used in preparing the tax returns "did not include, nor were they derived from, the internal audit reports or their related work papers prepared by Bunge during those years." Relying particularly on *United States* v. *Coopers & Lybrand,* 413 F.Supp. 942 (D. Col. 1975), *aff'd,* 550 F.2d 615 (10 Cir. 1977), Noall contends that the Government has not established the relevance of the documents sought and that public policy considerations dictate against their compelled production.[2] If we do not accept this position, Noall requests that we remand for an evidentiary hearing.

The statutory language is "may be relevant or material". Congress acted advisedly in using the verb "may be" rather than "is", since the Commissioner cannot be certain that the documents are relevant or material until he sees them. This court has consistently held that the threshold the Commissioner must surmount is very low, namely, "whether the inspection sought 'might have thrown light

upon' the correctness of the taxpayer's returns". See *Foster* v. *United States*, 265 F.2d 183, 187 (2 Cir.), *cert. denied*, 360 U.S. 912 (1959). The threshold is particularly low when, as here, the papers at issue are the taxpayer's own and there is no question of the invasion of the privacy of third persons against their will. Cf. *United States* v. *Harrington*, 388 F.2d 520, 523 (2 Cir. 1968).

On Bunge's own statements the internal audit reports and related work papers pass the applicable test. Clearly the purposes of the internal audit include the detection of overstatements or understatements of revenues or expenses, and of identifying accounting procedures that would lead to these. If the internal auditors have ascertained an understatement of revenues or an overstatement of expenses, this plainly might throw light on the correctness of the returns. We find no significance in the point, stressed by appellant, that the internal audit reports and related work papers were not used in preparing Bunge's income tax returns. The Commissioner's interest lies in whether the tax returns correctly reflected Bunge's actual income, not simply whether they were correctly prepared from the books of account and other records used. We are clearly on record on this score. *United States* v. *Shlom*, 420 F.2d 263, 265 (2 Cir. 1969), *cert. denied*, 397 U.S. 1074 (1970).

We are similarly unpersuaded by appellant's argument that enforcement of the summons runs counter to public policy since Bunge employees would be inhibited from full and frank disclosure to the internal auditors if they knew that their statements or investigations flowing from them were subject to production at the insistence of the IRS. In support of this contention appellant cites a number of non-tax cases where discovery of internal reports or other information was denied: *Keyes* v. *Lenoir Rhyne College*, 552 F.2d 579 (4 Cir.), *cert. denied*, 434 U.S. 904 (1977) (action under Title VII of the Civil Rights Act of 1964); *Richards* v. *Maine Central R.R.*, 21 F.R.D. 590 (D. Me. 1957) (wrongful death action under Safety Appliance Act and Federal

Employers' Liability Act); *Bredice* v. *Doctors Hospital, Inc.*, 50 F.R.D. 249 (D.D.C.) *aff'd on rehearing*, 51 F.R.D. 187 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973) (malpractice suit); *Gillman* v. *United States*, 53 F.R.D. 316 (S.D.N.Y. 1971) (wrongful death action under Federal Tort Claims Act); *Banks* v. *Lockheed-Georgia Co.*, 53 F.R.D. 283 (N.D. Ga. 1971) (employment discrimination suit); *New York Stock Exchange, Inc.* v. *Sloan*, 22 F.R. Serv. 2d 500 (S.D.N.Y. 1976) (private action under Securities Exchange Act of 1934); *Scott* v. *McDonald*, 70 F.R.D. 568 (N.D. Ga. 1976) (malpractice suit). As is apparent, the factual setting of these cases is quite different from that here. Also all these cases arose in the course of discovery where the Rules of Civil Procedure leave much to the judge's discretion. With respect to enforcement of the tax laws, Congress itself has decided the policy issue, and it is not for the courts to challenge that determination. In this, as in many other procedural questions, the collection of the revenue stands apart. See *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. (59 U.S.) 272, 282 (1856); *United States* v. *McKay*, 372 F.2d 174, 176 (5 Cir. 1967); but see *United States* v. *Brown*, 478 F.2d 1038, 1040-41 (7 Cir. 1973).

This brings us to the Tenth Circuit's decision in *United States* v. *Coopers & Lybrand, supra*, 550 F.2d 615. The court there affirmed a district court ruling which declined to enforce a summons requiring an independent accounting firm to produce two sets of documents—its program for conducting the audit of the taxpayer, Johns-Manville, Inc., and a "tax pool analysis" file, prepared by the taxpayer's personnel, which dealt with Johns-Manville's contingent income tax liabilities. The portion of the decision relating to Coopers & Lybrand's audit program, namely, its instructions to its auditors, affords no support to Noall.[3] Here the Government did not seek Bunge's internal audit *program;* rather it sought the results. These had already been turned over by Coopers & Lybrand, 550 F.2d at 617, 619, and were not at issue in that case. In refusing to enforce

the summons in regard to the tax pool analysis, both the district court and the court of appeals gave much weight to the fact that this was not used in preparing the company's income tax return, 413 F.Supp. at 950, 953-54, 550 F.2d at 620-21.[4] To the extent that the decision was influenced by this factor, it is not authoritative in this circuit.[5]

What we said in *United States* v. *Morgan Guaranty Trust Co.*, 572 F.2d 36, 42 n. 9 (2 Cir.), *cert. denied sub nom. Keech* v. *United States,* 47 L.W. 3217, (October 2, 1978), largely disposes of appellant's request for an evidentiary hearing.[6] If appellant wished to advance expert accounting opinion on lack of relevance or materiality of the internal audit reports and related working papers, as was done by oral testimony in *Coopers & Lybrand,* it could have proffered appropriate affidavits. If what appellant desires is to have the district judge examine the materials *in camera* so as to increase his understanding of their relevancy and materiality to the tax investigation, this would be a task which, in most cases, certainly including this one would be so burdensome and probably so impossible of performance that Congress could not have meant to impose it upon busy district judges.

Affirmed.

1. As is not uncommon, the Joint Appendix submitted pursuant to FRAP 30 is heavily encumbered with these memoranda. Memoranda of Law in the district court are not part of the record on appeal, FRAP 10(a), and should not be transmitted by the clerk under FRAP 11(b) or reproduced in an appendix under FRAP except when the memoranda have independent relevance, e.g., where there is a dispute whether a point was raised or a concession made in the district court. See *Aquascutum of London, Inc.* v. *S.S. American Champion,* 426 F.2d 205, 213 n. 6 (2 Cir. 1970); *Drewett* v. *Aetna Casualty & Surety Co.,* 539 F.2d 496 498-501 (5 Cir. 1976). The Joint Appendix also contains multiple copies of two

opinions in cited cases, both of which are available in official reports. Although it is useful for the court to have copies of opinions in cases not yet officially reported, they should be annexed as addenda to the briefs or filed along with them rather than being included in appendix.

2. Bunge's further argument, namely, that the Government has not satisfied the requirement of *United States* v. *Powell,* 379 U.S. 48, 57-58 (1964), of showing "that the information sought is not already within the Commissioner's possession" borders on the frivolous. The fact that the Commissioner has been given access to Bunge's books and records does not mean that he is already in possession of the audit reports and work papers which he thinks may cast doubt upon the reliability of them.

3. The adverse effects of disclosure of this program on Coopers & Lybrand are developed in the opinion of the District Court, 413 F.Supp. at 948-49; the lack of benefit to the Government is explained by the Court of Appeals, 550 F.2d at 621.

4. The district court also emphasized that the tax pool analysis consisted of projections rather than records of actual transactions. 413 F.Supp. at 952-53.

5. We need not and do not express any opinion as to what we would do if confronted with the precise problem of the tax pool analysis presented to the Tenth Circuit in *Coopers & Lybrand.*

6. The authoritativeness of this portion of the *Morgan Guaranty* opinion is not affected by the refusal of a bare majority of the Court to accept part of the dicta on 572 F.2d at 41-42. *United States* v. *LaSalle National Bank,* 57 L. Ed. 2d 221. (1978).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, and FELIX KARUL, Revenue Agent of the Internal Revenue Service, *Petitioners,* —*against*— ROGER NOALL, as Executive Vice President of Bunge Corporation, *Respondent.*	MEMORANDUM DECISION M 18-304

CANNELLA, D. J.:

Petition to enforce a summons issued by the Internal Revenue Service ["IRS"], pursuant to 26 U.S.C. § 7602, is granted. See 26 U.S.C. §§ 7402(b), 7604(a).

On November 22, 1977, an IRS summons was issued and served by petitioner Karul, an IRS Revenue Agent, directing the respondent's appearance December 13, 1977, for the purposes of testimony and production of documents. According to petitioners, the testimony and documents sought by the summons are relevant to and may reasonably be expected to shed light upon the federal tax liabilities of a corporation under IRS investigation. Petitioners further allege that the data sought is not in their possession and has not been examined previously. The respondent did not appear on the appointed date and has persisted in his refusal to comply with the summons.

The November 22, 1977 summons seeks by way of documents "All Internal audit reports and related work papers for the periods ended 3-31-72, 3-31-73, 3-31-74." These dates reflect the chronological scope of investigation of the subject corporation. The respondent, Roger Noall, is executive vice president of the corporation and has custody of the summoned documents.

United States v. Powell, 379 U.S. 48 (1964), sets forth the criteria under which a court may enforce a summons issued by the IRS under section 7602. According to the Supreme Court, the IRS may obtain enforcement of its summons by showing "that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed . . . ." *Id.* at 57-58. The Second Circuit has broadly interpreted the "relevancy" standard to be whether the information sought "might shed light on the accuracy of the taxpayer's returns." United States v. Davey, 543 F.2d 996, 999 (3d Cir. 1976), *citing* Foster v. United States, 265 F.2d 183, 187 (2d Cir.), *cert. denied,* 360 U.S. 912 (1959).

The Court has considered all the papers submitted in connection with the instant application. Viewed against the standard applicable in this jurisdiction, the Court finds that the IRS summons directed to the respondent is entitled to judicial enforcement.

Respondent's request for an evidentiary hearing is denied on the authority of United States v. Morgan Guaranty Trust Co., No. 77-6191, slip op. at 1492-93 n. 9 (2d Cir., February 6, 1978).

Accordingly, the petition is granted.

SO ORDERED.

JOHN M. CANNELLA
United States District Judge

Dated: New York, N. Y.
May 12, 1978.

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

(b) TO ENFORCE SUMMONS. If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) JURISDICTION OF DISTRICT COURT. If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

Supreme Court, U. S.
FILED
MAR 30 1979
MICHAEL RODAK, JR., CLERK

No. 78-1272

In the Supreme Court of the United States

OCTOBER TERM, 1978

ROGER NOALL, ETC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1272

ROGER NOALL, ETC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner seeks review of the decision below enforcing an Internal Revenue summons requiring him to produce audit reports of a corporation he serves as an officer. Since petitioner has complied with the summons, the case is moot and certiorari should be denied.

The pertinent facts showing that the case is moot are as follows: On November 22, 1977, Revenue Agent Felix Karul of the Internal Revenue Service issued and served on petitioner, as Executive Vice-President of Bunge Corporation, an Internal Revenue summons. The summons directed him to produce all of the internal audit reports and related work papers pertaining to Bunge Corporation's federal income tax liabilities for the fiscal years ending March 31, 1972, March 31, 1973, and March 31, 1974 (A. 20).[1] Following petitioner's refusal to comply

[1] "A" refers to the joint appendix filed in the court of appeals.

with the summons (A. 15, 30), the government commenced this enforcement proceeding in the United States District Court for the Southern District of New York (A. 13). The district court ordered the summons enforced (A. 129-131; see also Pet. App. 8a-9a). The court of appeals affirmed (Pet. App. 1a-7a).

Following the decision of the court of appeals, petitioner moved the court of appeals, and subsequently, the district court, for a stay of enforcement of the summons pending certiorari. Both courts denied petitioner's requests for a stay. On February 6, 1979, the district court further ordered that unless petitioner obeyed the summons on or before February 13, 1979, he would be held in civil contempt. On February 12, 1979, Mr. Justice Marshall denied petitioner's application for a stay of enforcement of the summons pending certiorari (No. A-718). We are advised by both counsel for petitioner and Revenue Agent Karul that petitioner thereafter fully complied with the summons.

Since petitioner has complied with the summons by producing the internal audit reports and related work papers, the case is moot. *Barney* v. *United States*, 568 F. 2d 116 (8th Cir. 1978); *United States* v. *Hankins*, 565 F. 2d 1344 (5th Cir. 1978), cert. denied, No. 78-806 (Feb. 21, 1979); *Kurshan* v. *Riley*, 484 F. 2d 952, 953 (4th Cir. 1973); *United States* v. *Lyons*, 442 F. 2d 1144 (1st Cir. 1971).

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1979

Supreme Court, U. S.
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APR 11 1979
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IN THE

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OCTOBER TERM, 1978

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ROGER NOALL, as Executive Vice President of
Bunge Corporation

Petitioner,

v.

UNITED STATES OF AMERICA and
FELIX KARUL, Revenue Agent of
the Internal Revenue Service

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

JOHN LOGAN O'DONNELL
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New York, New York 10017
Counsel for Petitioner

of Counsel:
OLWINE, CONNELLY, CHASE,
O'DONNELL & WEYHER

April 11, 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1272

ROGER NOALL, as Executive Vice President of
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FELIX KARUL, Revenue Agent of
the Internal Revenue Service

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

In their responding memorandum, the United States does not address, and apparently concedes, the arguments set forth by Bunge Corporation ("Bunge") for granting a writ of certiorari in this matter. Instead, the United States confines its opposition to an argument that the case is moot. The case is not moot because: (1) a determination that the requested documents are not relevant will affect the use of those documents in later proceedings, and (2) the dispute represents a recurring controversy which would otherwise continue to evade review by this Court.

The Third Circuit in *United States* v. *Friedman*, 532 F.2d 928 (3rd Cir. 1976) (a case not cited and apparently ignored by the United States) has held that notwithstanding compliance with an order enforcing an Internal Revenue Service summons, an appeal challenging the summons is not moot since a ruling in favor of the taxpayer could affect the subsequent use of the documents at issue:

> If the taxpayers were to prevail in their contention that all summonses were illegal . . ., then the records acquired . . . would have been obtained unlawfully. Such a ruling could affect the possible use of these records in any subsequent criminal or civil proceeding brought against the taxpayers. *United States* v. *Friedman*, *supra*, at 931.

The cases cited by the United States do not involve documents which are kept annually by the taxpayer and which represent a potentially recurring controversy with the United States for other taxable years, such as Bunge's corporate internal audit reports.*

A case, like the instant one, is not moot if it is "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 515 (1911). This doctrine has been reformulated as the combination of two elements: (1) the challenged action was too short to be fully litigated prior to its cessation, and (2) there is a reasonable expectation that the same complaining party would be subject to the same action again. See *Securities and Exchange Commission* v. *Sloan*, 436 U.S. 103, 109 (1978); *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975).

*The hardship wrought upon the petitioner in this controversy is exacerbated by the repeated refusals of the United States to agree to stays of the court orders, which coupled with the summary nature of these proceedings will continue to render ultimate appellate review impossible.

In the context of the summary proceeding of the enforcement of the summons in the instant case, the action will be too short to be fully litigated, thereby satisfying the first element. Moreover, there is a reasonable expectation that the Internal Revenue Service will again summon Bunge's internal audit reports, as such reports exist for taxable years still open to review by the Internal Revenue Service. Accordingly, the current dispute is not moot.*

In light of the factors detailed above, the United States' sole objection to the writ of certiorari is without foundation. Accordingly, such writ should be granted.

Respectfully Submitted,

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New York, New York 10017

Counsel for Petitioner

of Counsel:

OLWINE, CONNELLY, CHASE,
O'DONNELL & WEYHER

April 11, 1979

*Contrary to the impression created by the United States on page 1 of their Memorandum, the summons in question requested not only the internal audit reports and related work papers "pertaining to Bunge Corporation's federal income tax liabilities" but *all* such reports for the years in question. Furthermore, despite the statement by the United States in its Memorandum, there has not yet been full compliance with the order of the district court. The testimony requested by the Internal Revenue Service in the summons has not yet been taken. This same partial non-compliance led the court in *United States* v. *Friedman*, supra at 931, to hold that the case was not moot.